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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 655

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN and LEONARD COHEN, *Petitioners,*

v.

STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioners, William Pearlman, William Blank, Blair Brown and Leonard Cohen, pray for a writ of certiorari to review a judgment of the Court of Appeals of Maryland which affirmed a judgment of the Criminal Court of Baltimore convicting petitioners of the common-law crime of conspiracy.

OPINION BELOW

The opinion of the Court of Appeals of Maryland (R. 118; Appendix B, *infra*) is reported at 232 Md. 251, 192 A. (2d) 767.

JURISDICTION

The judgment and opinion of the Court of Appeals of Maryland (Appendix B, *infra*) was entered and filed on July 12, 1963 (R. 118). A timely motion for reargument was filed on August 8, 1963 (R. 136), pursuant to Rule 850 of the Maryland Rules of Procedure (1961 ed.), which permits the filing of such motions within thirty days after the filing of the opinion of the court. The motion for reargument was denied on September 9, 1963 (R. 141).

The jurisdiction of this Court is conferred by 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution because they were not adequately informed of the accusations against them, the charges being no more definite than that petitioners had engaged in a common-law criminal conspiracy to wrong persons with whom they might have business dealings.

2. Whether petitioners were denied due process of law by being convicted of an offense with which they were not charged.

STATEMENT OF THE CASE

During the period charged in the indictment (R. 45-47; Appendix A, *infra*)—i.e., from February 19, 1957 to September 10, 1959—petitioners were engaged in the business of selling home improvements to home owners, principally through a corporation known as Reynolds Engineering & Supply Co., Inc. Petitioner William Pearlman was president of Reynolds. Peti-

tioner William Blank was its secretary-treasurer. Petitioner Leonard Cohen was its credit manager from August 1958 on. Petitioner Blair Brown was sales-manager from April 30, 1959 to August 6, 1959. Between October 1956 and November 1959, the Reynolds Company processed more than 2,500 sales. The sales were generally made on credit, the purchaser executing an installment note secured by a second mortgage on the real property being improved. The notes were discounted for Reynolds by financial institutions, to whom Reynolds assigned the loan papers with recourse. (R. 68-69, 76, 120.)

On September 10, 1959, a two-count indictment (R. 45-47, 6; Appendix A, *infra*) was returned by the grand jury for the city of Baltimore naming the four petitioners and seventeen other individuals as defendants. Each count recited that the defendants were engaged, under various company names, "in the business of general home repairs and improvements, and in the sales of goods, wares, merchandise and chattels, and in the financing thereof" in Baltimore on February 19, 1957. The first count thereafter alleged nothing more than that from February 19, 1957 to the return date, the defendants conspired "by wrongful and indirect means and divers false pretenses and other false and subtle means and devices to cheat, wrong, defraud and impoverish" all persons who were or might become their customers, stockholders, or financing institutions.[1] The second count thereafter alleged

[1] Following the recitation as to the nature of the defendants' business on February 19, 1957, the first count alleged in toto that the defendants:

> "thence continuously thereafter to and including the date of the finding of the indictment in this case at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, com-

nothing more than that the accused conspired for the same period and by the same means to obtain "certain properties" of the same intended victims with the intent "fraudulently and maliciously to cheat, wrong, defraud and impoverish" the latter.[2]

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bine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to cheat, wrong, defraud, and impoverish, their customers, stockholders, patrons, and financial institutions, financing home improvements having contractual relations with them, and such other members of the public, corporations, and financial institutions, as might become customers or stockholders or have business dealings with them, of certain properties, moneys, goods, and chattels, then and there the property of their said customers, stockholders, patrons, and financial institutions having contractual relations with them, and such other members of the public, corporations, and financial institutions as might become customers or stockholders or have business dealings with them, to the great damage and injury of said customers, patrons, stockholders, financial institutions, corporations and members of the public to the evil example of all others in like manner offending and against the peace, government and dignity of the State." (R. 46; Appendix A, *infra.*)

[2] Following the recitation as to the nature of the defendants' business on February 19, 1957, the second count alleged in toto that the defendants:

> "thence continuously thereafter to and including the date of the finding of the indictment in this case, at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, combine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to obtain and acquire for themselves certain properties, moneys, goods and chattels, then and there the property of their customers, patrons, and financial institutions financing home improvements having contractual relations with them, the stockholders of said corporations, and such other persons, corporations and financial institutions, as

The indictment was not laid under any statute, nor did it allege a conspiracy to commit a statutory offense. As the trial court held (R. 56), the accusation was of a common-law conspiracy, an offense which is still recognized under Maryland law.

Petitioners moved to dismiss the indictment as being vague and indefinite and also moved for bills of particulars and to require an election of counts (R. 48-52). The trial court, the Criminal Court of Baltimore, denied the motions (R. 62, 64, 66).

In an accompanying opinion (R. 54-66), the trial court pointed out that Maryland recognizes two kinds of criminal conspiracies: (1) agreements to accomplish wrongful (but not necessarily illegal) objectives and (2) agreements to use wrongful means to effectuate non-wrongful objectives (R. 56). The opinion vacillated as to which kind of conspiracy was alleged and as to whether the indictment charged one or more conspiracies. At several points, the opinion placed the conspiracy within the wrongful-objective category, describing it as one to cheat and defraud persons of property, and held that the means allegations were surplusage (R. 56, 57, 58). The opinion also held

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might become customers or have business dealings with them, with the intent then and there fraudulently and maliciously to cheat, wrong, defraud, and impoverish their said customers, patrons, and financial institutions having contractual relations with them, the stockholders, actual and potential, of said corporations, and such other persons, corporations, financial institutions and others to the said Jurors unknown as might have business dealings with them to the great damage and injury of said customers, patrons, stockholders, financial institutions, persons and corporations, to the evil example of all others in like manner offending and against the peace, government and dignity of the State." (R. 47; Appendix A, *infra*.)

that the indictment alleged "only one conspiracy to victimize several separate classes of persons" (R. 62), and that "the two counts merely charge the same offense in different ways" (R. 66). But at other points the opinion described the indictment as charging "a conspiracy by wrongful and indirect means and divers false pretenses varying only in the alleged object or purpose to be accomplished by the conspiracy" (R. 55, 65).

Petitioners and two other defendants, Jerome Glass and Albert Greenberg, elected to be tried by the court without a jury. After a trial of twenty-eight days, recorded in a transcript of 4287 pages,[3] the court found petitioners and Glass guilty and acquitted Greenberg (R. 83).

The court issued an opinion in support of its verdicts (R. 67-83). Therein it adopted the "means" category for the offense, stating (R. 67):

> "Both counts charge a conspiracy by wrongful and indirect means and divers false pretenses, varying only in the alleged object or purpose to be accomplished by the conspiracy."

Although the opinion summarizes some of the evidence and is studded with references to "the illegal plan," "the conspiracy," and "this crime" (R. 69, 76, 77), it nowhere states what it was that the defendants agreed on that constituted the found conspiracy. It is reasonable to infer from some of the passages, however, that the found conspiracy included, but was not limited to, an agreement to overcome customer reluctance to execute second mortgages by concealing from them,

[3] The trial transcript is included in the original record, which has been filed with the Court in addition to the certified record.

until the jobs were under way, that second mortgages were among the documents they signed (R. 75-76, 78). This inference is confirmed by the subsequent opinion of the Court of Appeals, which stated (R. 122-123; emphasis supplied):

> "In its trial memorandum, the court, in speaking of the unlawful means employed to carry out *the unlawful object* of the conspiracy, found, *among other things*, that the five defendants who appealed had formulated a scheme to overcome the general reluctance of customers to execute mortgages for home improvements by inducing them to sign blank forms which they did not know were mortgages; that home improvements had been sold and mortgages fraudulently obtained from customers 'by concealment, trickery and misrepresentation'; that when the defendants had a legal obligation to speak, they 'spoke falsely'; and that the signing by customers of blank mortgages had 'facilitated the operation of the illegal plan and its objectives,' and entered verdicts of guilty against each of the defendants."

The "other things" found and the nature of "the unlawful object of the conspiracy" cannot be ascertained from the trial court's opinion or from the opinion of the Court of Appeals.

Petitioners testified at the trial and produced other witnesses (R. 73, 129). The defense case included evidence contradicting, both directly and circumstantially, prosecution testimony that the defendants had concealed and agreed to conceal from customers the fact that the latter were signing second mortgages (R. 73-75, 129). But the defense also introduced other evidence in attempted refutation of the indictment's general allegations of a scheme to wrong the public. For example, among the subjects covered by the direct testi-

mony of the first defense witness, petitioner William Pearlman, were the following: the adequacy of the consideration for the corporate stock issued to the management of the Reynolds Company (Trial Tr. 2249-53, 2281); whether a public stock issue violated the blue sky laws or was offered on unfair terms (Trial Tr. 2257-58, 2278-81); the Company's practices in obtaining financing from lending institutions and protecting their lenders against defaults on the loan securities (Trial Tr. 2263-78, 2287-95); the Company's dividend practices (Trial Tr. 2282-87); the exclusion of unearned carrying charges from a prospectus description of assets (Trial Tr. 2387-91); the use of various trade names (Trial Tr. 2339-2404).

No one at the trial considered this testimony to be irrelevant. On the contrary, it was admitted without objection or question, and the state cross-examined on some of the topics (Trial Tr. 2478-90, 2494-99, 2500-03, 2507-08).

Because some of the customers called as prosecution witnesses had denied their purported signatures to mortgage documents, the defense produced expert handwriting testimony that the signatures were genuine (R. 74; Trial Tr. 4100-19). The testimony was admitted without question or objection. After the trial, the defense learned from the trial judge's opinion that despite "the suggestion made by some witnesses that their signatures had been forged . . . the State's case is not based on the theory of forgery" (R. 74). The basis for this conclusion by the trial court does not appear, nor is there any way of knowing whether the State's case would have included "the theory of forgery" if the expert testimony had not been introduced.

The trial court sentenced petitioner Pearlman to five years' imprisonment, petitioner Blank to four years' imprisonment, and petitioners Leonard Cohen and Blair Brown to a fine of $2,000 each (R. 45).[4]

Petitioners appealed to the Court of Appeals of Maryland. The State's brief on appeal took different views of the nature of the crime, depending on the contention it was seeking to refute. In defending the indictment against the claim of vagueness, the State argued that the crime charged was a conspiracy to effectuate an illegal objective—i.e., to defraud—and the means were not an element of the offense. It said (R. 92; emphasis in original):

> "The indictment here need state only the conspiracy and its object. The *means* by which the conspiracy was intended to be accomplished are matters of evidence."

But in contending that there had been no variance between the indictment and the findings, the State's brief took the opposite view, stating (R. 99-100):

> "It was the illegal methods and means by which these Appellants in combination operated to cheat and defraud which were the nub of the offense charged and proved. . . . And arguendo, even if the trial court had found, in its pre-trial memo, as Appellant suggests, that the conspiracy was one calculated to achieve an unlawful objective, this court could disregard such ruling, if it found, upon examination of the indictment, that such was not the case, as distinguished from the trial court's finding of fact as to the nature of the conspiracy found, upon all of the evidence. Stated differently, this court could find that the indictment alleged a conspiracy to effect a lawful objective

[4] The other convicted defendant, Jerome Glass, was sentenced to eighteen months imprisonment (R. 45).

by illegal means, even if the trial court had not so found."

In affirming the conviction, the majority of the Court of Appeals held that the indictment charged both kinds of conspiracy (R. 123-24, 130-31) and that it was not unconstitutionally vague because, "While the means are not spelled out, the indictment is otherwise reasonably clear and certain" (R. 125-26). The court stated that it saw no reason for the trial court's refusal to require particulars (R. 128), but held that the refusal was not prejudicial error because the defendants had introduced evidence "aimed at rebutting and refuting" State testimony concerning misrepresentation in obtaining mortgages, and "it is difficult to understand what other defenses the defendants might have made (and none are shown) had they been furnished with particulars" (R. 129). The Court also stated (R. 129-30):

> "Although some irrelevant testimony was produced to defend against forgery (which the court later stated had not been charged in the indictment)[5] the defendants failed to show how they had been injured or put to any disadvantage by the refusal of the trial court to require the filing of particulars."

Chief Judge Brune dissented on the grounds that "the defendants were not adequately apprised of the nature of the charges against them" (R. 134). The dissent also stated (R. 134-35):

> "The Court recognizes that the indictment does not adequately inform the defendants of the

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[5] This is not what the trial court stated. It actually said (R. 74), "However, the State's case is not based on the theory of forgery."

charges against them by stating that the demand for a bill of particulars should have been granted (at least in part). The Court then holds that the defendants were not prejudiced in their defense by the denial of particulars because of the large number of witnesses and extensive testimony which they were able to produce even without particulars being furnished. This seems to me to amount to a holding that because the defendants knew of their own conduct and misdeeds, they were not prejudiced by not being told specifically what charges they would have to answer. That may well be true of the guilty, but it would not be true of the innocent. Such a rule would greatly hamper the innocent in the preparation and presentation of their defense and would facilitate their conviction, even if they were in fact innocent. In the event of conviction under such circumstances they would then come to an appellate court with a finding of guilt against them and with serious difficulty in showing prejudice."

THE RAISING OF THE FEDERAL QUESTIONS

The federal questions sought to be reviewed were first raised as such in petitioners' Brief in the Court of Appeals. The Brief listed as two of the Questions Presented the following (R. 89):

"1. Whether the indictment is so vague and indefinite that appellants were not adequately informed of the accusation against them, in violation of Article 21 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the United States Constitution."

"3. Whether there was such major variances between the conspiracy alleged and the conspiracy found that appellants were convicted of a crime with which they were not charged, in violation of Article 21 of the Maryland Declaration of Rights

and the due process clause of the Fourteenth Amendment."

The argument in the Brief of these issues was also in terms of the federal due process clause (R. 14-15, 34, 37-38).

The foundation for raising the federal questions in the Court of Appeals was laid by the motions to dismiss the indictment and for bills of particulars (*supra*, p. 5). The motions did not assert that the action sought was requested for federal constitutional reasons; however, under Maryland law such an assertion was not necessary to preserve the federal question for consideration on appeal to the Maryland Court of Appeals.[6] The opinion of the Court of Appeals listed petitioners' contentions as follows (R. 123):

> "On appeal, the defendants contend (i) that the indictment is so vague and indefinite that they were inadequately informed of the accusations against them in violation of the constitutional requirements; (ii) that the denial of particulars was prejudicial error; (iii) that the convictions violate the due process clauses of the state and federal constitutions because there were such variances between the conspiracy alleged and the conspiracy found that the defendants were convicted of a crime not charged; and (iv) that the evidence does not support the convictions, particularly that of the defendant Blair Brown."

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[6] Rule 522b, Maryland Rules of Procedure (1961 ed.), provides: "For purposes of reconsideration by the trial court or review on appeal, it is sufficient that a party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and unless requested by the court it shall not be necessary to state the grounds therefor."

In discussing the first of these contentions, the Court of Appeals stated (R. 124), "This right [to be informed of the accusation] is guaranteed by Article 21 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the Constitution of the United States." The court decided each of the listed contentions adversely to petitioners (R. 118-35; Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

1. This case establishes that in Maryland it is lawful to convict people of the archaic crime of common-law conspiracy in a Kafka-like proceeding. Under the holding below, defendants can be tried on charges which are uninformative and unintelligible to them, to the trial court, and very likely to the prosecution; even after trial, conviction, appeal and long-term imprisonment, the nature of their transgression can remain undefined. The State of Maryland has resurrected one of the oppressive conveniences of the common-law conspiracy concept—that "in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime." Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 406.

This kind of procedure is supposed to have been eliminated by the Fourteenth Amendment, which exacts of the states the same notice of accusation which the Sixth Amendment requires in federal prosecutions. "[I]n all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; . . . in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed." *Hodgson* v. *Vermont*, 168 U.S.

262, 269. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201.

The first count of the indictment charged that from February 19, 1957 to the indicting date (September 10, 1959), petitioners and seventeen other individuals conspired with each other and persons unknown "by wrongful and indirect means and divers false pretenses and other false and subtle means and devices to cheat, wrong, defraud and impoverish" all persons who were or might become "their customers, stockholders, patrons, and financial institutions . . . having contractual relations with them." The second count charged that the accused conspired for the same period and by the same means to obtain "certain properties" of the same intended victims with the intent "fraudulently and maliciously to cheat, wrong, defraud and impoverish" the latter. (*Supra*, pp. 3-4.)

These allegations were the *only* notice to petitioners of the offense of which they were accused, their motions for particulars having been denied. All that petitioners were told, therefore, was that they had conspired over a period of two years and seven months to defraud three classes of persons, sufficiently comprehensive to include the whole world, of unspecified property, in unspecified respects, by wrongful but unspecified means. In short, petitioners were accused, in ponderous but unilluminating invective, of nothing more definite than that they had agreed to be dishonest.

The crime alleged in the indictment was, according to the Court of Appeals, an agreement to use unlawful

means to attain an unlawful objective (R. 123-24, 131). It was necessary, therefore, for the indictment to describe the agreement sufficiently to enable the accused to identify it. Illustrative of the kind of pleading that was needed is Form 3 appended to the Federal Rules of Criminal Procedure.

The Court of Appeals itself recognized (*supra*, p. 10), that the means of the alleged conspiracy was "not spelled out" by the indictment's language ("by wrongful and indirect means and divers false pretenses and other false and subtle means and devices"). Yet the verdict was based on the theory that the criminality lay in the means (*supra*, p. 6).

Moreover, the other element of the alleged crime, the conspiratorial objective, was also not intelligibly defined, it being alleged no more definitely than a purpose "to cheat, wrong, defraud and impoverish" whomever the accused might do business with. This language was nothing more than a generalized, conclusory description of the criminal area; it gave no information of the criminal conduct attributed to the accused. The Constitution requires, however, not only a "general description of an offense," but also "a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U.S. 483, 487. As stated in *United States* v. *Cruikshank*, 92 U.S. 542, 558: "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'"

The conclusive proof that the indictment did not fulfill its constitutional function of notice is that no one can anticipate from reading it that the alleged conspiracy included a scheme to conceal from customers their signing of mortgage instruments. Yet it was held—after the trial, of course—that such a plan was a part of the conspiracy, the other parts remaining undivulged.

From this indictment it was impossible for the defense to know what to expect at the trial, what to prepare for, and what to defend themselves against. The indictment did not even supply a clue to the nature of the conspiratorial agreement. If an indictment charges a conspiracy to commit murder or arson or some other identifiable substantive offense, that in itself supplies some idea of the criminal conduct alleged. The accused at least knows that he is being charged with plotting something as concrete as a slaying or a burning. But fraud, not to mention "wronging" and "impoverishing," is so elastic a concept, embracing an infinite variety of conduct, that a bare allegation of a conspiracy to defraud supplies no comparable indication of the offense.

Again, the defendants might have had some notion of the charge if the indictment had named at least some of the persons against whom the alleged conspiracy was directed, or even if it had confined itself to a single discrete class of victims, or if it had identified the deceptive methods. Since the indictment did none of these things, the defendants could prepare for trial only by assuming the impossible burden of examining and being ready to justify against unknown attack every single business transaction which they had conducted or contemplated during a period of two

years and seven months, including their thousands of consummated sales, undisclosed numbers of attempted sales, and all dealings with or involving financing institutions and stockholders.

Whatever the conspiracy was, it was an executed one, since it allegedly covered a period of a year and seven months and the State's case included testimony of alleged victims. The State was, therefore, in a position to name some, and perhaps all, of the victims. Its failure to do so in itself made the indictment unconstitutionally vague. *Lauer* v. *United States,* 320 F. 2d 187; *Larkin* v. *United States,* 107 Fed. 697.

Also compounding the vagueness of the indictment was the absence of any allegation of an overt act. Most states and the federal government have modified the common law by requiring that an overt act be alleged and proved in conspiracy cases. Maryland, however, still adheres to the pristine doctrine, as the present indictment shows. Yet simultaneously Maryland has discarded one of the ameliorating devices of the common-law courts. "At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges." *Bannon* v. *United States,* 156 U.S. 464, 468. The indictment here alleged no overt act and was of a more general description than any that can be found in the old English cases. By denying all particulars, the Maryland courts have showed less solicitude for defendants than the courts of a supposedly cruder age.

2. The indictment was not only uninformative; it was misleading. It alleged a conspiracy to victimize

three classes—actual and potential customers, stockholders and financing institutions. And the accused were told by the trial court's pre-trial opinion that there was only one conspiracy (*supra*, pp. 5-6). They were entitled to assume, therefore, that the fraudulent scheme was one which by its nature would victimize all three named classes. Yet the only agreement which was eventually (after trial) intelligibly defined as being part of the conspiracy was one which operated solely against customers (*supra*, pp. 6-7). Thus appellants were convicted of an offense with which they were not charged, in clear violation of due process. *De Jonge* v. *Oregon*, 299 U.S. 353, 362; *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Kepl* v. *United States*, 299 Fed. 590, 591; Scott, *Fairness in Accusation of Crime*, 41 Minn. L. Rev. 509, 519. Cf. *Kotteakos* v. *United States*, 328 U.S. 750.

3. After trial, conviction and affirmance on appeal, there still remains unidentified the culpable conduct for which petitioners are to be imprisoned and fined. By crediting contradicted prosecution testimony, the trial court apparently found that the crime included *in part* a scheme to conceal temporarily from customers their signing of mortgage documents. But what else the scheme included is shrouded in mystery. (*Supra*, pp. 6-7.)

Moreover, the generic nature of the crime is likewise obscure. In Maryland there are two kinds of criminal conspiracy—those with wrongful objectives and those which contemplate the use of wrongful means. To the untutored the dichotomy may not be altogether clear, but that it is firmly established in Maryland law is beyond dispute. The conspiracy here varied like a chameleon. To the trial court and in

the State's brief on appeal, it was sometimes one, sometimes the other, never both. Then it turned out, according to the Court of Appeals, to be both. (*Supra*, pp. 5-6, 9-10.)

1. Even the majority of the Court of Appeals thought that the trial court was wrong in denying the motions for particulars. But it held that the denial was not prejudicial because the defendants had introduced evidence "aimed at rebutting and refuting" testimony introduced by the State. (*Supra*, p. 10.) The holding below thus establishes the unique principle that defendants are adequately informed of the accusation against them because they hear the State's testimony before they put on their own case.

It is manifestly impossible to have a fair trial if the issues, instead of being defined in advance by a separate statement, emerge from the evidence introduced by the prosecution during the trial in bits and pieces. The defense does not know what evidence it should object to for irrelevancy, and the court does not know what evidence should be excluded. Defense counsel cannot tell if his understanding of the issues, derived from analysis of the prosecution testimony, corresponds to the intentions of the State or the views of the court. The defense cannot assemble its witnesses and evidence before trial, but must hunt up its evidence during the nights of the trial days. The prosecution is left "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell* v. *United States*, 369 U.S. 749, 768. The inevitable result is the kind of shambles that occurred in this case (*supra*, pp. 7-8). It is kinder to condemn people without trial than to subject them to such an illusion of trial, considering that the result is bound to be the same.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

Indictment

(Filed Sept. 10, 1959)

State of Maryland. City of Baltimore, to wit:

The Jurors of the State of Maryland, for the body of the City of Baltimore, do on their oath present, that JEROME GLASS, WILLIAM PEARLMAN, WILLIAM BLANK, SAMUEL COHEN, ALBERT BLANK, JOHN HANNA, LEONARD COHEN, ARTHUR DECKELMAN, otherwise called A. DECK, otherwise called R. J. DECKELMAN, BLAIR BROWN, HAROLD KLEIN, IRVIN SIEGEL, WILLIAM BICHELL, HARRY BERNSTEIN, MANUEL GOTTFRIED, CHARLES C. NOONAN, PAUL KLEBANOW, GUNTHER WERTHHEIMER, ALBERT GREENBERG, JOHN PARRINELLO, otherwise called JOHN CULLOTA, W. W. WATSON and LOUIS LANDAY, each late of said City, trading as and doing business under divers names and styles, namely, "Peerless Home Improvement Company", "Peerless Contractors", "Reynolds Engineering and Supply, Inc.", "Reynolds Investment Corporation', "Reynolds Mortgage and Investment Corporation", "Peerless Home Improvement Company", and "Peerless Construction Company", engaged in the business of general home repairs and improvements, and in the sales of goods, wares, merchandise, and chattels, and in the financing thereof, in said City, on the nineteenth day of February, in the year of our Lord nineteen hundred and fifty-seven, and thence continuously thereafter to and including the date of the finding of the indictment in this case, at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, combine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to cheat, wrong, defraud, and impoverish, their customers, stockholders, patrons, and financial institutions, financing home improvements having contractual relations with them, and

such other members of the public, corporations, and financial institutions, as might become customers or stockholders or have business dealings with them, of certain properties, moneys, goods, and chattels, then and there the property of their said customers, stockholders, patrons, and financial institutions having contractual relations with them, and such other members of the public, corporations, and financial institutions as might become customers or stockholders or have business dealings with them, to the great damage and injury of said customers, patrons, stockholders, financial institutions, corporations and members of the public to the evil example of all others in like manner offending and against the peace, government and dignity of the State.

SECOND COUNT

And the Jurors aforesaid, upon their oath aforesaid, do further present, that JEROME GLASS, WILLIAM PEARLMAN, WILLIAM BLANK, SAMUEL COHEN, ALBERT BLANK, JOHN HANNA, LEONARD COHEN, ARTHUR DECKELMAN, otherwise called A. DECK, otherwise called R. J. DECKELMAN, BLAIR BROWN, HAROLD KLEIN, IRVIN SIEGEL, WILLIAM BICHELL, HARRY BERNSTEIN, MANUEL GOTTFRIED, CHARLES C. NOONAN, PAUL KLEBANOW, GUNTHER WERTHHEIMER, ALBERT GREENBERG, JOHN PARRINELLO, otherwise called JOHN CULLOTA, W. W. WATSON and LOUIS LANDAY, each late of said City, trading as and doing business under divers names and styles, namely, "Peerless Home Improvement Company", "Peerless Contractors", "Reynolds Engineering and Supply, Inc." "Reynolds Investment Corporation", "Reynolds Mortgage and Investment Corporation", "Peerless Home Improvement", and "Peerless Construction Company", engaged in the business of general home repairs and improvements, and in the sale of goods, wares, merchandise, and chattels, and in the financing thereof, in said City, on the nineteenth day of February in the year of our Lord nineteen hundred and fifty-seven, and thence continuously

thereafter to and including the date of the finding of the indictment in this case, at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, combine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to obtain and acquire for themselves certain properties, moneys, goods and chattels, then and there the property of their customers, patrons, and financial institutions financing home improvements having contractual relations with them, the stockholders of said corporations, and such other persons, corporations and financial institutions, as might become customers or have business dealings with them, with the intent then and there fraudulently and maliciously to cheat, wrong, defraud, and impoverish their said customers, patrons, and financial institutions having contractual relations with them, the stockholders, actual and potential, of said corporations, and such other persons, corporations, financial institutions and others to the said Jurors unknown as might have business dealings with them, to the great damage and injury of said customers, patrons, stockholders, financial institutions, persons, and corporations, to the evil example of all others in like manner offending and against the peace, government and dignity of the State.

SAUL A. HARRIS,
The State's Attorney for the City of Baltimore.

APPENDIX B

Opinion and Judgment Below

Filed: July 12, 1963

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1962

No. 159

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN, LEONARD COHEN and JEROME GLASS

v.

STATE OF MARYLAND

Brune, C. J., Hammond, Prescott, Horney, Marbury, JJ.

Opinion by Horney, J.
Brune, C. J. dissents.

HORNEY, Judge.

The defendants, William Pearlman, William Blank, Leonard Cohen, Blair Brown and Jerome Glass, were convicted by the Criminal Court of Baltimore sitting without a jury of conspiracy to cheat and defraud, and have appealed.

Trading and doing business under various names, the defendants, who were engaged in the business of selling home improvements and in the financing thereof, were indicted (with others) in a two-count indictment for conspiring to cheat and defraud their customers, financial institutions which financed home improvement sales, and stockholders of the corporations the defendants organized for the purpose of doing business, and such other persons and corporations as might thereafter have dealings with them. Both counts charge a conspiracy to cheat and defraud, varying only in the phraseology of the objective or purpose sought to be accomplished by the conspiracy.

Specifically, the first count charged that the defendants unlawfully conspired "by wrongful and indirect means and divers false pretenses and other false and subtle means and devices to cheat, wrong, defraud and impoverish" such customers, financial institutions and stockholders of their property and money.

The second count—the phraseology of which was similar to the first—charged that the defendants unlawfully conspired "by wrongful and indirect means and devices to obtain and acquire for themselves" the property and money of such customers, financial institutions and stockholders "with the intent then and there fraudulently and maliciously to cheat, wrong, defraud and impoverish" such customers, financial institutions and stockholders.

The defendants moved to dismiss the indictment on the grounds that it was vague and indefinite in various respects, but the trial court in a trial memorandum ruled that the indictment adequately informed the defendants that they were charged with a conspiracy to effect an unlawful objective "by wrongful and indirect means and divers false pretenses" and denied the motions. The defendants then moved for particulars, but the motions therefor were also denied.

One of the corporate entities under which the defendants did business was known as the Reynolds Engineering & Supply Co., Inc. The defendants were the officers and managerial executives of the company. While most of the sales were made by salesmen who were regarded as independent contractors and were paid on a commission basis, some sales were made by company executives and officers. The sales were generally made on credit, the customer paying in installments over a period of time.

Between October of 1956 and November of 1959, the Reynolds Company processed more than twenty-five hundred sales. When a sale was made, the salesman would have the customer sign a contract which set forth the work

to be done and the estimated cash price, or, if a time plan was desired, the amount of each monthly payment and the total number of payments were also set forth. In arriving at the cash price, it was customary to double the estimated cost to the company. And on a time plan an additional ten per centum carrying charge per year was added to the cash price. The customer, usually without knowing it, was also required to sign in blank a confessed judgment note, a mortgage securing the note, a fire insurance endorsement, an authorization permitting a credit check and an estoppel form. Subsequently, an officer or executive of the company would check with the customer concerning the order and the adequacy of the proposed price. If the credit of a customer was approved, a typed, clean contract would ordinarily be prepared in final form, to which the customer's signature would be obtained. The company would fill in the terms of the already-signed note and mortgage, the mortgage stating the full "time" price as the amount secured.

Reynolds had arrangements with financial institutions for the discounting of its paper. It would assign the notes and mortgages to the financing institution with recourse, and, after it had accumulated a specified reserve, it would receive a part of the cost of a job from the lending institution. If an account became delinquent, the lender would return the note and reassign the mortgages to Reynolds. Reynolds would then be required to replace the delinquent account with a new note and mortgage or the institution could withdraw the amount of the delinquent account from the reserve. When a loan was paid in full, the mortgage would be reassigned to Reynolds and released.

One of the company salesmen testified that the defendants Pearlman (president of the company) and Blank (its secretary-treasurer) had told him and other salesmen at a sales meeting not to let customers know, that they were in fact signing mortgages; that the salesmen

were to so arrange the papers to be signed as to conceal the text of the mortgage; and that if a customer asked what the instrument was, they were to say it was mortgage insurance. Two other salesmen also testified that Pearlman and Blank had told them not to let customers know they were signing mortgages, but to tell them, if they asked, that the instruments were insured mortgages. A bookkeeper-secretary employed by Reynolds for a short time testified that she asked Pearlman how they got customers to sign mortgages, and he replied they were told that they were signing for loan insurance to pay the loan in case the customer died.

The State also called sixty-four of the customers who testified, in substance, that they did not know, at the time of signing, that they had signed mortgages, and, in some cases, that they had been told that they were not executing mortgages.

Two attorneys (holding notary commissions), who were employed by Reynolds to visit customers and obtain their acknowledgments to the previously signed mortgages, or secure so-called "confirmatory" mortgages, as the case might be, testified that they were instructed to, and did, explain to the customers the nature of the mortgage instruments. Other evidence was produced by the defendants to contradict or refute that produced by the State.

In its trial memorandum, the court, in speaking of the unlawful means employed to carry out the unlawful object of the conspiracy, found, among other things, that the five defendants who appealed had formulated a scheme to overcome the general reluctance of customers to execute mortgages for home improvements by inducing them to sign blank forms which they did not know were mortgages; that home improvements had been sold and mortgages fraudulently obtained from customers "by concealment, trickery and misrepresentation"; that when the defend-

ants had a legal obligation to speak, they "spoke falsely"; and that the signing by customers of blank mortgages had "facilitated the operation of the illegal plan and its objectives," and entered verdicts of guilty against each of the defendants.

On appeal the defendants contend (i) that the indictment is so vague and indefinite that they were inadequately informed of the accusations against them in violation of the constitutional requirements; (ii) that the denial of particulars was prejudicial error; (iii) that the convictions violate the due process clauses of the state and federal constitutions because there were such variances between the conspiracy alleged and the conspiracy found that the defendants were convicted of a crime not charged; and (iv) that the evidence does not support the convictions, particularly that of the defendant Blair Brown.

(i)

The indictment was so framed as to adequately inform the defendants of the charge against them.

Of course, the obtaining of the money and property of others with intent to cheat and defraud is *per se* an illegal objective. Here, the means employed by the defendants—concealment, trickery and misrepresentation to obtain the signing of security instruments—were also unlawful. See *State* v. *Buchanan*, 5 Har. & J. 317 (1821). The question, then, is whether the indictment was sufficient to inform the defendants that they were charged with having used unlawful means to accomplish an unlawful objective.

"[A]n indictment must be so framed as to inform the defendant of the charge against him in order that he may prepare his defense and may also protect himself against a subsequent prosecution for the same offense." *Seidman* v. *State*, 230 Md. 305, 312, 187 A.2d 109, 113 (1962). This right is guaranteed by Article 21 of the Maryland Decla-

ration of Rights and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Nevertheless, the general rule with respect to a conspiracy indictment is that it "need state only the conspiracy and the object of it; the means by which it was intended to be accomplished are only matters of evidence to prove the charge." *Piracci* v. *State*, 207 Md. 499, 506, 115 A.2d 262, 269-(1955). See also *Archer* v. *State*, 145 Md. 128, 125 Atl. 744 (1924); *State* v. *Buchanan*, *supra*. But it has been held that this rule does not apply to conspiracies to do a lawful act by unlawful means and that in such cases it must appear by the indictment that the means to be employed are unlawful. *Garland* v. *State*, 112 Md. 83, 75 Atl. 631 (1910). However, the formula for a conspiracy indictment set forth in Chapter 87 of the Acts of 1945, now codified as Code (1957), Art. 27, § 40, requires only a brief statement of the "object of the conspiracy." Statutes prescribing a short form of indictment—provided the simplified form contains the essential elements of the crime it purports to charge—are generally upheld on the ground that the right of the defendant to demand the particulars of the accusation protects him against injury. *Neusbaum* v. *State*, 156 Md. 149, 156-157, 143 A. 872 (1928); *Kelley* v. *State*, 181 Md. 642, 647, 31 A.2d 614 (1943).

This Court has not heretofore had to decide what effect, if any, the formula prescribed by § 40 of Art. 27 has on the rule laid down in the *Garland* case. And although a question as to it is presented in this case, it is not imperative that we decide it now, and we leave it open. For assuming, without deciding, that the *Garland* rule is still operative, the indictment herein not only charged the defendants with a conspiracy having an ultimate object to cheat and defraud certain classes of persons and corporations with whom the defendants had dealings in the conduct of their business, but also charged them with having employed

unlawful means to obtain the objective they sought. While the means are not spelled out, the indictment is otherwise reasonably clear and certain. In it, the defendants are charged with the use of "wrongful and indirect means and divers false pretenses and other false and subtle means and devices" the object of which (as stated in the first count) was to "cheat, wrong, defraud and impoverish" customers, financial institutions and stockholders of their property and money; and (as stated in the second count) the object was to "obtain and acquire for themselves" the property and money of such persons and corporations with the intent to "cheat, wrong, defraud and impoverish" them. This, we think, stated the essential elements of the crime and was enough to adequately inform the defendants that they were charged with a conspiracy to do unlawful acts through unlawful means. This was proper (according to *State* v. *Buchanan, supra*) and is all that is required by the statutory form of indictment. See *Neusbaum* v. *State*, *supra* (at p. 156 of 156 Md.). Even before the effective date (June 1, 1945) of § 40 of Art. 27, the same basic language used in the indictment in this case to charge the defendants with a conspiracy to cheat and defraud had been regarded by this Court to be sufficient and similar indictments had been held not to be demurable.

"The sufficiency of the indictment in *Blum* v. *State*, 94 Md. 375, 51 Atl. 26 (1902), which charged the appellants therein and another with conspiring

> "'by means of divers false pretences and representations, and other false and subtle means and devices to obtain and acquire unto themselves certain properties, moneys, goods and chattels' of certain corporations and persons named in the indictment, * * * of the value of $2,500, and to cheat and defraud such persons and corporations,"

was regarded as having been "established by the decision in *State* v. *Buchanan*, 5 H. & J. 317." Obviously, that in-

dictment was remarkably similar to the second count of the indictment in this case. The fact that the *Blum* indictment specified the value of the properties and monies sought to be obtained would seem to be mere surplusage now since § 40 of Art. 27 does not require such an allegation.

In *Archer* v. *State*, *supra*, and in *Lockhart* v. *State*, 145 Md. 602, 125 Atl. 829 (both decided in 1924), where the defendants, who were stockbrokers, were charged in the first four counts of the indictment in each case (in language similar to that employed in the present indictment) with having conspired "by wr ngful and indirect means and divers false pretenses and subtle devices to cheat and defraud" their customers, the fifth and sixth counts in each indictment set out what the false pretenses practiced by the defendants were, but this was before the use of a simplified form of indictment had been authorized.

The indictment in *Lanasa* v. *State*, 109 Md. 602, 71 Atl. 1058 (1909), was even less informative than the indictment in the *Blum* case in that in *Lanasa* it was held unnecessary to describe the particular property which was the object of the conspiracy in an indictment that had charged the defendant with conspiracy with others to injure and destroy the property of a named person.

Since the use of a short form of indictment in conspiracy cases has been permissive, the phraseology of some of the indictments that have met the test of sufficiency has been simplified to even a greater degree. For example, in *Winkler* v. *State*, 194 Md. 1, 69 A.2d 674 (1949), *cert. den.* 339 U.S. 919 (1950), an indictment charging that the defendants unlawfully conspired to disturb the peace was held not to be vague and indefinite. In *Horwitz* v. *State*, 200 Md. 578, 92 A.2d 575, and in *McGuire* v. *State*, 200 Md. 601, 92 A.2d 582, *cert. den.* 344 U.S. 928 (both decided by this Court in 1952), indictments that did not specify the acts constituting the basis for the charges that the respective

defendants had conspired with others to violate the lottery laws were held not to be fatally defective.

It is also contended that the names of the known victims of the conspiracy should have been alleged in the indictment. Even though the object of the conspiracy had been effected with respect to most of the twenty-five hundred victims of the conspiracy before the indictment was filed, it would have served no useful purpose to have named them in the indictment. Nor was the State required to do so. In a case such as this, where a fraud is worked upon customers as a whole, their designation as a class is sufficient. See *Archer* v. *State*, *supra* (at p. 144 of 145 Md.), where it was held that it is not necessary to allege the names of the persons conspired against if it is alleged that some of the class were defrauded.

The defendants further contend that each of the counts in the indictment charge what are in reality two crimes—a conspiracy where the object is unlawful and a conspiracy where the means are unlawful. In *State* v. *Buchanan*, *supra*, the indictment contained the same two charges, but it was not held to be bad for that reason.

(ii)

The denial of particulars was not reversible error. We see no reason why the trial court should not have required the State to furnish the defendants with the particulars of the offense charged in a manner that would not have disclosed to the defendants the details of the proof upon which the State relied to make out its case, but we find nothing in the record to show that the defendants were injured by the denial of particulars or that they were put to any real disadvantage in having to present their defense without particulars.

A defendant is not entitled as of right to particulars. Rule 715 a provides that on motion by a defendant, the court may order the filing of a bill of particulars. But in

most cases the grant or refusal of particulars is within the sound discretion of the trial court. *Seidman* v. *State*, *supra*. And this Court will not reverse a denial of particulars unless there has been a gross abuse of discretion resulting in injury to the accused. *Leon* v. *State*, 180 Md. 279, 23 A.2d 706 (1942); *State* v. *Lassotovitch*, 162 Md. 147, 159 Atl. 362 (1932); *Neusbaum v. State*, *supra*; *Lanasa* v. *State*, *supra*. In general the rule in other jurisdictions is in accord with that in Maryland. See the annotation in 5 A.L.R.2d 444, 447.

The problem with regard to the granting of particulars in cases where the indictment is framed in the formula prescribed by the statute was discussed in *Neusbaum* v. *State*, *supra*, and in *Larmore v. State*, 180 Md. 347, 24 A.2d 284 (1942). In *Neusbaum*, the question was dismissed because it had not been properly reserved for appellate review. And in *Larmore*, the indictment was upheld, but it was pointed out that any generality in the indictment could have been corrected by a bill of particulars.

In defense of the charges against them, the defendants produced forty-six witnesses, including the six defendants on trial (one of the six was found not guilty) who denied their guilt and the existence of and participation in a conspiracy. The greater portion of the testimony of the customers who were called as witnesses by the defendants concerned their awareness of the fact that they knew they were executing mortgages on their properties. In addition to this there was the testimony of the two notaries (who were also attorneys) regarding the exculpatory explanations they made in taking the acknowledgements of customers to the previously executed mortgages and in acquiring "confirmatory" mortgages whenever it was deemed necessary. Since it is obvious that such testimony was aimed at rebutting and refuting that which had been produced by the State to show the existence of fraud, concealment and misrepresentation in obtaining the mortgages, it

is difficult to understand what other defenses the defendants might have made (and none are shown) had they been furnished with particulars. Although some irrelevant testimony was produced to defend against forgery (which the court later stated had not been charged in the indictment), the defendants failed to show how they had been injured or put to any disadvantage by the refusal of the trial court to require the filing of particulars. It seems clear therefore, in the absence of a showing that they had been prejudiced, that the defendants are not entitled to a reversal because of the denial of particulars.

(iii)

There was no variance between the conspiracy alleged and the conspiracy of which the defendants were convicted.

The contention here is that the court, in its pretrial memorandum, ruled that the indictment alleged a conspiracy to achieve only an unlawful objective, and, in its trial memorandum, found that the defendants were guilty of a conspiracy to achieve a lawful objective through the use of unlawful means. We do not agree, and a careful reading of both memoranda shows that such is not the case. In both memoranda, the court pointed out that both counts of the indictment "charge a conspiracy by a wrongful and indirect means and divers false pretenses, varying only in the alleged object or purpose to be accomplished by the conspiracy." In the pretrial memorandum, it is apparent that the trial court was of the opinion, and so informed the defendants, that they were charged with a conspiracy to effect an unlawful objective by the use of unlawful means. The indictment in *State* v. *Buchanan*, *supra*, was worded in a similar manner and it was not held bad for duplicity. Nor do we find anything in the trial memorandum to indicate, as the defendants contend, that the court found them guilty of a conspiracy having a lawful object which was obtained through unlawful means. On the contrary, we think it is clear that the court based its verdicts

of guilty on the unlawful means the defendants had employed to effect the unlawful objective they sought to accomplish. There was therefore, as we see it, no variance between what the indictment charged and what the court subsequently found as a fact. Since the indictment had charged a conspiracy to do an unlawful act by unlawful means, the defendants could be, and were, properly convicted.

It was also contended that there was a variance because the defendants were accused of conspiring against three classes of persons and corporations but were convicted of conspiracy against the only one class. The case of *Archer v. State, supra* (at p. 144 of 145 Md.), settled this contention. Since it was held therein that an indictment alleging "a conspiracy to defraud the general public or a particular class is sufficient," it is apparent that the indictment in this case charging the defendants with a conspiracy to victimize several classes of persons was not improper.

(iv)

The evidence was legally sufficient to support the convictions of all the defendants.

At the trial of this case, the court heard a total of one hundred and fourteen witnesses—sixty-eight for the prosecution and forty-six for the defense. It is not necessary to repeat here even the gist of the evidence that was produced, for all of the defendants, except Blair Brown, seem to concede that there was evidence to prove a conspiracy if what was alleged in the indictment was sufficient to inform them that they had been charged with a conspiracy to accomplish an unlawful objective or purpose by unlawful means. This point (and the others), having been decided adversely to them, the trial court, which had the opportunity to see and hear the witnesses, was in a position to judge their credibility, and we cannot say that

the court sitting without a jury was clearly in error in finding a verdict of guilty on the evidence produced.

With regard to Blair Brown, the testimony of one of the salesmen—to the effect that Brown had instructed him not to multiply for a customer the number of months by the amount of monthly payments totaling the time price of the job—in conjunction with the testimony of five customer-witnesses who made damaging statements against Brown personally—to the effect that he had deceived them by misrepresenting the nature of the mortgages signed, by concealing that mortgages were being signed, or by denying that mortgages would be required—was sufficient to support the verdict of the trial court.

Finding no prejudicial error in the rulings and findings of the trial court, the judgments will be affirmed.

Judgments affirmed: three-fifths of the costs to be paid by appellants Pearlman, Blank and Glass; the remaining two-fifths to be paid by the State.

Bruxe, Chief Judge (dissenting).

I regret being in disagreement with my colleagues in this case. The basis of my disagreement is not any question as to the sufficiency of the evidence to sustain the convictions, but my belief that the defendants were not adequately apprised of the nature of the charges against them.

The opinion of the Court upholds the sufficiency of each count of the indictment as stating an offense, and in support of its holding cites prior decisions of this Court which have upheld indictments charging conspiracies that were also lacking in specific statements as to the object of the conspiracy or the means of its accomplishment or both. The Court recognizes that the indictment does not adequately inform the defendants of the charges against them by stating that the demand for a bill of particulars should have been granted (at least in part). The Court then holds that the defendants were not prejudiced in their defense

by the denial of particulars because of the large number of witnesses and extensive testimony which they were able to produce even without particulars being furnished. This seems to me to amount to a holding that because the defendants knew of their own conduct and misdeeds, they were not prejudiced by not being told specifically what charges they would have to answer. That may well be true of the guilty, but it would not be true of the innocent. Such a rule would greatly hamper the innocent in the preparation and presentation of their defense and would facilitate their conviction, even if they were in fact innocent. In the event of conviction under such circumstances they would then come to an appellate court with a finding of guilt against them and with serious difficulty in showing prejudice.

Because I think that the affirmance of the conviction here on the ground that no prejudice resulted to these defendants from the refusal of a statement of the particulars of the offense with which they were charged undermines an essential of criminal pleading and the fairness which it seeks to assure for the innocent and the guilty alike, I respectfully dissent from the holding of the Court.

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FILED
FEB 19 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 655

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN AND LEONARD COHEN,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND)

BRIEF FOR RESPONDENT IN OPPOSITION

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v.

STATE OF MARYLAND,
Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland appears in full on pages 4-17 of the Appendix to the Petition for Writ of Certiorari, and is also reported in 232 Md. 251, 192 A. 2d 767.

JURISDICTION

The final judgment of the Court of Appeals of Maryland was entered on September 9, 1963, but Respondent denies that jurisdiction is founded under 28 U.S.C., 1257(3), as alleged by Petitioners.

QUESTIONS PRESENTED

It is believed by the Respondent that the following questions clarify the questions presented by the Petitioner.

1. Was the indictment legally sufficient to charge Petitioners with the crime of conspiracy?

2. Were Petitioners denied due process of law by being convicted of an offense with which they were not charged?

STATUTE INVOLVED

Chapter 87 of the Acts of Maryland, 1945, codified as Code, Article 27, Section 40 (1957 Edition):

> "In any indictment or warrant for the crime of conspiracy, it shall be sufficient to use a formula substantially to the following effect: 'That A-B and C-D on the day of , 19 at the County (City) aforesaid unlawfully conspired together to murder X-Y (or other conspiracy here stating briefly the object of the conspiracy) against the peace, government and dignity of the State'."

STATEMENT

Petitioners William Pearlman and William Blank were President and Secretary-Treasurer, respectively, of the Reynolds Engineering & Supply Co., Inc., incorporated in September, 1956, and engaged primarily in selling home improvements to home owners. Blair Brown was sales manager of the corporation from April 30 to August 6, 1959 and Leonard Cohen was credit manager from August, 1958 until the date of indictment.

Most of Reynolds' customers were persons who could not qualify for legitimate home improvement work, because of bad credit rating. The company would learn of these persons and its salesmen would contact them. Standard operating sales procedure was for the salesman to induce

the customer, after selling him on the need for Reynolds to do his work, to sign a contract which established the improvements to be made, the cash price and number of monthly payments. The customer was required to sign a fire insurance endorsement, a homeowner's authorization, an estoppel, a confessed judgment note and mortgage form —all of which were in blank. The cash price of the job shown on the contract was subsequently doubled, plus 10 percent of the total cost. The time price was later written in the note and mortgage in Reynolds' office, out of the customer's presence, and the mortgage then recorded. The paper was then discounted and assigned to another corporation.

The salesmen of Reynolds were schooled by Appellants and assisted in obtaining from customers blank notes and mortgages and other documents for work to be done, with all efforts turned toward the concealment of the true nature of the documents being signed. Squads of Reynolds' emissaries, including, in many cases, one or more of Appellants, descended upon the potential customer, deliberately and calculatingly fast talking, high-pressuring and confusing the said customer, until he signed the documents thrust before him, the contents of which were concealed. In many cases, the customers were widows without business experience, unlearned and illiterate persons, or old people unable to cope with the smooth sales talk of Appellants and their salesmen.

Appellants and their representatives either did not advise the customers that they were executing a mortgage, when they should have, or when directly asked, denied that a mortgage was being signed. Once the mortgage and other documents were signed in blank, Appellants then raised the discussed price to a figure in most cases more than double. They promised and misrepresented "insurance"

coverage which was neither given nor contemplated by them.

Testimony throughout the case demonstrated clearly that Appellants knowingly and purposely concealed from customers the fact that a mortgage was being executed, because, had they been told, the deal could never have been consummated.

Once the mortgages were signed, they were illegally notarized and recorded. The first that many of these customers found of the existence of the mortgages was at the State's Attorney's office and the figures thereon bore no relation to those initially discussed by the customer with either Appellants or their salesmen.

Judge Anselm Sodaro, sitting in the Criminal Court of Baltimore, returned a general verdict of guilty against these Petitioners upon a two-count indictment charging conspiracy. Thereafter Petitioners noted an appeal to the Court of Appeals of Maryland, which affirmed the conviction. Petitioners thereafter filed a Motion For Reargument, which, on September 9, 1963, was denied.

ARGUMENT

This case represents one of the boldest and most insidious plots to swindle and cheat the public ever perpetrated in the history of the State of Maryland. The trial court found as a fact that the corporation, in its existence, sold more than 2500 jobs and in connection with these sales the Petitioners here conspired among themselves and with others in a scheme of fraud and false pretenses which was classic in the extreme.

It is respectfully suggested that a review on certiorari by this Court is neither necessary or desirable and that no question warranting decision by this Court is presented.

I.

The Indictment Was Legally Sufficient to Charge Petitioners With the Crime of Conspiracy.

In *State v. Davis*, 203 N.C. 13, 35, 164 S.E. 737, 745, cert. den. *Davis v. State of North Carolina*, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561, the Court said:

> "The gist of a conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means . . . Indeed, the conspiracy is the crime and not its execution . . . 'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete.'
>
> "There is a distinction between the offense to be committed and the conspiracy to commit the offense. In the one, the corpus delicti is the act itself. In the other, it is the conspiracy to do the act . . ." See: *State v. Bellin*, 55 R.I. 374, 181 A. 804.

Certainly, under long-standing prior decisions of the Maryland Court of Appeals, the indictment here complained of is not constitutionally defective. In *State v. Buchanan*, 5 H. & J. 317 (1821), the indictment, in two counts, charged defendants with conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the president, directors and company of the bank of the United States; the second count charged these persons with a conspiracy only (not executed as in the first count), falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the president, directors and company of the bank of the United States. The indictment, following as it did the common law form of pleading, was held not insufficient.

In *Blum v. State*, 94 Md. 375, 51 A. 26 (1902), the indictment charged appellants with conspiring (and was held not deficient):

> "'by means of diverse false pretences and representations, and other false and subtle means and devices to obtain and acquire unto themselves certain properties, moneys, goods and chattels', of certain corporations and persons named in the indictment, . . . of the value of $2,500, and to cheat and defraud such persons and corporations." Accord: *Archer v. State*, 145 Md. 128, 125 A. 744 (1924) and *Lockhart v. State*, 145 Md. 602, 125 A. 829 (1924).

In 1945, by Chapter 87 of the Acts of the Maryland General Assembly, the short-form indictment (set out hereinbefore, p. 2), was enacted. Subsequent thereto, in *Winkler v. State*, 194 Md. 1, 10, 69 A. 2d 674, cert. den., 339 U.S. 919, 70 S. Ct. 621, 94 L. Ed. 1343 (1952), the indictment (fifth count) charged that Appellants: "unlawfully did conspire, combine, confederate and agree together and with each other unlawfully, riotously and tumultuously to assemble and gather together to disturb the peace," though it did not spell out the details of how the breach of peace was to be carried through, just as here the indictment pleaded the unlawful conduct of and false pretenses practiced by Appellants, in that they conspired to cheat and defraud the public and did unlawfully conspire, by false pretenses to obtain the properties, money, goods and chattels of the public, with the intent to cheat, wrong and defraud them, in matters relating to home improvements, though not supplying the details of how the conspiracy was effected, in the manner Appellants claim was required.

In *McGuire v. State*, 200 Md. 601, 92 A. 2d 582, cert. den., 344 U.S. 928, 73 S. Ct. 496, 97 L. Ed. 714, (1952), the second count of an indictment charged a conspiracy to

violate the "laws of the State of Maryland relating to lotteries" and the same was held not to be defective. Accord: *Hurwitz v. State*, 200 Md. 578, 583, 92 A. 2d 575, where the Court said:

> ". . . in Maryland, in case of criminal conspiracy the form of indictment reflects the nature of the crime of conspiracy, as defined and explained 130 years ago in the opinion of this Court, by Judge Buchanan, in *State v. Buchanan*, 5 H. & J. 317. For present purposes the outstanding characteristics of the common law crime of conspiracy are (1) that (unlike the federal general conspiracy statute) the crime is complete in the conspiracy without any overt act, and (2) that (like a conspiracy to defraud the United States) a criminal conspiracy may consist of a conspiracy to do things which are not themselves criminal if done by one person. After a review of the English authorities over a period of 400 years, illustrating these two characteristics, the opinion in *State v. Buchanan* reached the conclusion that, 'and such is the character of conspiracy, so ramified is it in its nature, the object and tendency of it being that, from which it derives its criminality, that it would be exceedingly difficult to give a single specific definition of the offense. By a course of decisions running through a space of more than four hundred years, from the reign of Edward III. to the 59 of George III, without a single conflicting adjudication, these points are clearly settled:' (stating nine points, including) '7th. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time — as in the *King v. Gill & Henry* . . . and 9th. That in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent. . . . From all which it results, that every conspiracy to do an unlawful act,

or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent; and makes no ingredient of the crime and therefore, need not be stated in the indictment.'. . . 'and in the *King v. Eccles*, 1 Leach's Crown cases 274, the indictment was for a conspiracy, by wrongful and indirect means, to impoverish one Booth, a tailor, and to deprive and hinder him from following and exercising his trade. In the first count in the indictment, the object of the conspirators was alleged to have been accomplished, and in the second count, the conspiracy only was charged. It was not denied that the conspiracy was an indictable offense, and the only objection on part of the defendant was, that the acts done to impoverish Booth, ought to have been set out in the indictment. But it was decided by the whole Court, that it was sufficient to allege the conspiracy and the object of it, the illegal combination being the gist of the offense; and that it was not necessary to state the means, by which the intended mischief was effected; for that the offense did not consist in doing the acts by which the end was accomplished (for they might be perfectly indifferent) but in the conspiring with a view to effect the intended mischief by any means. . . .' Though in some respects these principles and rules seem to permit loosely drawn indictments, in other respects they express only the logic and common sense (and some times the sheer necessity) of the case. An indictment for robbery or larceny must ordinarily state the property stolen and the name (if known) of the owner. If, however, pickpockets conspire to ply their trade in a public place it is manifestly impossible to state what property they conspire to steal or whom they conspire to rob."

Thus, an examination of Appellants' ingenious and misleading rhetoric reveals that they (1) quarrel with the rules of the common law, (2) complain of no overt act requirement in State criminal conspiracies and (3) seek to convince this Court that not only must the conspiracy be well pleaded in the indictment (as it is here) but also that the mechanics of its execution, i.e., the offense to be committed, must also be included and pleaded. The above authorities, we suggest, under the common law, make no such demands upon the State.

Traditionally, common law states have upheld the validity of indictments framed as here. In *People v. Fields*, 288 Mich. 166, 284 N.W. 685, 687, the Court said, quoting from the earlier case of *People v. Watson*, 75 Mich. 582, 42 N.W. 1006:

> ". . . public policy requires that Courts should lend active aid in punishing persons who conspire to obtain money or other valuable thing by means of false pretenses, with intent to cheat and defraud. . . ."

In *State v. Malone*, 13 N.J. Super. 510, 80 A. 2d 592, 597 aff'd., 16 N.J. Super 383, 84 A. 2d 745, the Court said:

> "A conspiracy to cheat and defraud by means of false pretense was also indictable at common law. 3 Chitty, Criminal Law, 3rd Am. ed. 1836, 1179; 2 Russell, Crime (9th Ed. 1936), 1451. In *State v. Young & Stainsby*, 37 N.J.L. 184, 187 (Sup. Ct. 1874), Chief Justice Beasley said: 'Mr. Bishop, in his second volume on Criminal Law, Sec. 171, says that the English Courts now hold, although doubts were entertained in the earlier stage of the inquiry, that the words "unlawfully, fraudulently and deceitfully, did conspire, combine, confederate and agree together to *cheat and defraud*" one "of his goods and chattels," contain a sufficient allegation of conspiracy without the mention of any means intended'."

And see *Outlaw v. United States*, C.C.A. Tex. 81 F. 2d 805, 806, 807, cert. den.; 298 U.S. 665, 56 S. Ct. 747, 80 L. Ed. 1389, where the second count, held to be sufficient, alleged simply the conspiracy to be one "to defraud the United States."

Compare the following cases, wherein indictments used the words "cheat" and "defraud", in connection with averments relating to use of false pretenses or false tokens: *Commonwealth v. Wallace*, 16 Gray 221, 223; *Alderman v. People*, 4 Mich. 414, *State v. Harroun*, 199 Mo. 519, 98 S.W. 467; *People v. Brady*, 56 N.Y. 182.

Appellants allege, at page 16 of their Petition herein: "If an indictment charges a conspiracy to commit murder or arson or some other indentifiable substantive offense, that in itself supplies some idea of the criminal conduct alleged. . . ." But fraud, not to mention "wrongdoing" and "impoverishing," is so elastic a concept, embracing an infinite variety of conduct, that a bare allegation of a conspiracy to defraud supplies no comparable indication of the offense.

Can the indictment here be said to be unilluminating when it charges that the Appellants, in the home improvement business, unlawfully conspired with themselves and others, by means of false pretenses, to cheat and defraud their customers and the public, of their property and money, or that they conspired, by false pretenses, to acquire the properties and money of their customers and the public, with the intent to cheat and defraud them? Clearly, what appellants would have the indictment allege was not only the conspiracy, but in addition, what was effected, pursuant to the conspiracy. As stated in *Glasser v. United States*, 315 U.S. 60, 66, 62 S. Ct. 629, 86 L. Ed. 680:

> "The particularity of time, place, circumstances, cause, etc., in stating the manner and means of effect-

ing the object of a conspiracy, for which petitioners content, is not essential to an indictment. . . ."

"The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of Sec. 37 of the Criminal Code."

Appellants, while not raising here the question of denial of particulars, do complain they should have been granted to them. As indicated by the Maryland Court of Appeals (Apx. 14), they show no prejudice, but merely claim a disadvantage because of the denial. In a matter such as the question of particulars, traditionally the trial courts have wide latitude as to whether they should be granted; in this case, since the indictment followed a constitutionally proper form, as pointed out hereinabove, error has not been shown, it is respectfully submitted, in the absence of a showing of prejudice.

II.

The Petitioners Were Convicted of the Crime With Which They Were Charged.

Appellants complain that the indictment failed to name at least some of the persons against whom the alleged conspiracy was directed. The trial court (Apx. 12) correctly stated the law when it said that "where a fraud is worked upon customers as a whole then designation as a class is sufficient". See *Glasser v. United States*, 315 U.S. 60, 66, 62 S. Ct. 457, 86 L. Ed. 680, rehearing den., sub nom. *Kretske v. United States*, 315 U.S. 827, 62 S. Ct. 629, 86 L. Ed. 1222; *Archer v. State*, supra, 15 C.J.S., pp. 1116, 1117, *Conspiracy*, Section 84, "*Persons conspired against*"; *State v. Malone*, supra, 80 A. 2d 592, at 597. In 2 Wharton, *Criminal Law* (11th Ed. 1912), 1820, Sec. 1663, it is stated: ". . . where, however, the conspiracy was to defraud a class

not capable of being at the time resolved into individuals or to defraud the public generally, then the specification of names is impracticable, and hence unnecessary."

Appellants further seek to make much of the distinction under the common law between the type of criminal conspiracy whose means are unlawful, and those with wrongful objectives. Quite clearly, the Maryland Court of Appeals found that the indictment charged a conspiracy to do an unlawful act by unlawful means and that that had been what the trial court had decided (Apx. 14, 15). Apparently, appellants do not necessarily quarrel with this appellate finding, but argue rather that the State took a somewhat different approach to it in its appeal brief. The answer to this may lie in semantics, i.e., the obtaining and acquisition of the properties and money of the persons and class conspired against might not be in and of itself an unlawful object; obtaining and acquiring such, with the intent to cheat and defraud and by means of false pretenses, would be. It was the latter unlawful object which the Court of Appeals found to have been the object of the conspiracy. However, the indictment stands or falls on a consideration of its clear language; under the authorities cited hereinbefore, it measures up to constitutional standards. In any event, it is to be supposed that even appellants would agree that so long as the means are unlawful (whatever the object — lawful or unlawful), conspiracy will lie. See 15 C.J.S., pp. 1057, 1058, 1065, *Conspiracy*, Sections 35, 42.

Can Appellants seriously argue that there cannot be charged under the common law a conspiracy to do an unlawful act by unlawful means? It seems they do not and the Court of Appeals correctly pointed out that the form of indictment herein had been employed in Maryland

as early as *State v. Buchanan*, supra, and was not then held bad for duplicity.

As stated at 15 C.J.S., pp. 1057, 1058, "*Conspiracy*", Section 35: "The offence thus defined excludes only confederations to accomplish lawful objects by lawful means; the offence includes all possible unlawful confederations."

CONCLUSION

The Respondent respectfully submits that an examination of Petitioners' arguments and the position which they take indicate that there is no substantial Federal question involved, and further that the decision below turns upon matters solely within the province of the State Courts and, therefore, this case should not be reviewed by this Court. For the reasons heretofore assigned, the Petition filed to this Honorable Court for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED.
MAR 2 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 655

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN and LEONARD COHEN, *Petitioners*,

v.

STATE OF MARYLAND

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

REPLY TO RESPONDENT'S OPPOSITION

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REPLY TO RESPONDENT'S OPPOSITION

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1. According to respondent's Opposition (pp. 5-8), it is routine "under long-standing prior decisions of the Maryland Court of Appeals" (Opp. 5) that common-law conspiracy indictments should be as uninformative, or almost so, as the one here. Yet respondent makes no effort to show how this indictment, which charges nothing more definite than a conspiracy to be

dishonest, supplies any intelligible delineation of the nature of the accusation or the alleged misconduct which prompted it. The Opposition thus reveals the need for the Court to take the earliest opportunity—this case—to correct what is not merely an isolated mistake, but a pervasive malpractice in Maryland. Conversely, if the Court rejects the opportunity, we may be sure that the unconstitutional practice will be more solidified and prevalent than ever in Maryland and that it may spread to other states as well.

2. We would not trouble to notice respondent's transparent endeavor to prejudice petitioners by ad hominem, extravagant representations, were it not that the recitations of wickedness confirm our thesis that petitioners' transgressions are still undefined.

From respondent's statement of facts, there emerges as petitioners' worst offense their cheating of "widows without business experience, unlearned and illiterate persons, or old people" by writing in the note and mortgage a price which was ten percent more than double the contract price (Opp. 3, 4). The Court of Appeals, however, was oblivious to any such conduct or plot. It described the pricing practice of petitioners' business as follows (Pet., A5-A6, emphasis supplied):

> "When a sale was made, the salesman would have the customer sign a contract which set forth the work to be done and the estimated cash price, *or*, if a time plan was desired, the amount of each monthly payment and the total number of payments were also set forth. In arriving *at the cash price*, it was customary to double the estimated *cost* to the company. And *on a time plan* an additional ten per centum carrying charge per year was added to the cash price."

In short, if a customer bought for cash (in which event there were, of course, no note and mortgage), he was quoted and paid the cash price, computed by doubling the company's cost. If he bought on credit, he was quoted and charged monthly payments which in total equalled the cash price plus a ten per cent per annum carrying charge. The Court of Appeals saw nothing illegal or nefarious about this, nor do we.

The significant thing is, however, that because of the vagueness of the indictment, respondent is able even at this late date to ascribe to petitioners any criminality it chooses. If the decision below stands and petitioners go to jail, neither they, nor the State, nor anybody else will ever know what were the infractions that sent them there.

Respectfully submitted,

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